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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL PEREZ, Defendant and Appellant.	F073736 (Super. Ct. No. BF159623A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant was charged and convicted of assault with a firearm, unlawful discharge of a firearm in a grossly negligent manner, unlawful possession of a firearm by a felon, and active participation in a criminal street gang after eyewitnesses identified him as the person who shot their uncle. The jury also found true gang enhancements and enhancements for personal use of a firearm and personal infliction of great bodily injury on a nonaccomplice, and the court found true prior prison term allegations. On appeal, defendant argues (1) the People's gang expert relayed inadmissible testimonial hearsay and the admission of this hearsay was prejudicial; (2) the trial court committed reversible error by failing to instruct the jury that offenses occurring after the present offense cannot be predicate offenses; (3) his counsel provided ineffective assistance by failing to object to the prosecution's reference to a fact not in evidence during closing argument; and (4) the cumulative effect of these errors resulted in a violation of his right to due process.

We conclude defendant's substantive conviction for active participation in a criminal street gang must be reversed because the gang expert related inadmissible hearsay and the erroneous admission of this evidence was prejudicial. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Evidence of March 28, 2015, shooting

Soon after he moved to the Rexland Park neighborhood, R.R. started getting harassed. He was bullied while in front of his property and chased on various occasions.

At trial, R.R. testified that on March 28, 2015, various family members were at his house helping him clean up after his cousin's birthday party. After R.R. went to bed, he heard his aunt scream loudly. She told him someone was outside hitting their car and vandalizing the property. R.R., his brother, and his stepfather opened the front door, yelled, and "everything just broke loose." According to R.R., he saw approximately six Hispanic males wearing black who were approximately 18 to 20 years old in front of his

house "vandalizing, hitting the cars" with their fists and kicking them. R.R. and his brother went outside and exchanged profanities with the group. R.R. heard the group of males saying, "You don't know me," "This is Rexland Park," "I'm gonna shoot," and "shoot him." A shot was fired and R.R. saw a gun. From behind him, he heard his uncle, C.U., say, "I've been shot."

According to R.R., he saw defendant pull out the gun and heard him say "shoot him already." R.R. saw a flash, turned around, and saw his uncle bleeding from his shoulder. When R.R. turned back around, the group was running away. R.R. and his family called the police, and an ambulance and officers arrived. That same night, R.R. was taken to an infield showup to identify the perpetrator. R.R. identified defendant as the shooter. R.R. also identified an individual in a wheelchair as having been among the group of men. R.R. testified there was a lot of graffiti in the neighborhood and he recalled it saying "Rexland Park Surenos."

H.H., R.R.'s cousin, testified to a series of events consistent with R.R.'s testimony regarding the night of the shooting. H.H. thought he saw about eight to 10 males in the group hitting the car. He and his family confronted the group and the group started walking back towards the street. According to H.H., someone in the group threatened to kill them and others were saying, "Just shoot him already" and "You don't know who you're messing with." H.H. testified he saw defendant pointing a gun towards his family before his uncle was shot. He also saw the gun defendant was holding "recoil" such that it was pointing up after the shot. H.H. also testified that one of the males in the group was in a wheelchair.

The victim, C.U., also testified to events consistent with those attested to by R.R. and H.H. C.U., however, did not see who shot him but he recalled hearing a member of the group say "Rexland Park."

Investigation of March 2015 shooting

Senior Deputy Daniel Perez, who is assigned to the gang suppression unit, testified he was dispatched to a location near the scene of the shooting where he met with defendant. Police had arrested and detained defendant in the back of a police car. Deputy Perez asked defendant if he was a member of the Varrio Rexland Park gang. Defendant would not admit he was a member, but when Deputy Perez asked him if he was a dropout, defendant responded, "hell no." According to Deputy Perez, "[i]f there's evidence to point that [someone was] in a gang and they haven't dropped out, that means they're still in the gang." Defendant also "said he was in good standing with the gang." Deputy Perez testified being in good standing with a gang could mean a person is a gang member. The People introduced Deputy Perez's photographs of graffiti taken on the night of the shooting on the street in the same area where he met with defendant. Deputy Perez testified he encountered defendant in 2011 and defendant was wearing a Kansas City Royals baseball hat that had the letters K and C on the front and the letters RP stitched on the side of the hat.

Deputy Ralph Lomas also testified he was involved in the investigation on the night of the shooting. After Deputy Jason Erickson reported one of the suspects involved was in a wheelchair, Deputies Rutter and Lomas, who were familiar with Jose Contreras and knew he used a wheelchair, went to Contreras's house to look for suspects. They found defendant and Yovani Leyva hiding in a doghouse in Contreras's backyard. Defendant and Leyva both wore black clothing and had shaved heads. Lomas detained them both.

Deputy Erickson also testified he was dispatched to the scene of the shooting. While there, Erickson stopped Luis Rodriguez, who was riding his bike, because H.H. reported Rodriguez had been involved in the group disturbance. Erickson then went to another location where officers had apprehended Javier Delgado and Jose Contreras. The police used defendant, Delgado, Contreras, and Leyva in an "infield showup" for R.R.

and H.H. to identify the suspected shooter. During the infield showup, the police showed each suspect to R.R. and H.H. one at a time. R.R. first identified Leyva as the shooter but said that he was not 100 percent sure. Then, when Erickson showed R.R. defendant, R.R. said "he was positive that [defendant] was the shooter," "he was a hundred percent sure," and that he had just gotten confused because Leyva looked similar because they both had short hair and were wearing dark clothing. Erickson testified H.H. also identified defendant as the shooter and said "he was sure that was him." The police did not recover the gun involved in the shooting.

Defendant was charged with attempted first degree murder (count 1; Pen. Code,[1] §§ 664, 187, subd. (a)); assault with a firearm (count 2; § 245, subd. (a)(2)); unlawful discharge of a firearm in a grossly negligent manner (count 3; § 246.3, subd. (a)); unlawful possession of a firearm (count 4; § 29900, subd. (a)); unlawful possession of a firearm by a felon (count 5; § 29800, subd. (a)(1)); and participation in a criminal street gang (count 6; § 186.22, subd. (a)). As to count 1, defendant was charged with enhancements for personal infliction of great bodily injury on a nonaccomplice (§ 12022.7) and personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subds. (c) & (d)). As to counts 2 and 6, defendant was charged with enhancements for personal use of a firearm (§ 12022.5, subd. (a)) and personal infliction of great bodily injury on a nonaccomplice (§ 12022.7). As to counts 1 through 5, defendant was charged with a gang enhancement (§ 186.22, subd. (b)(1)). It was also alleged that defendant had served one prior prison term within the meaning of section 667.5, subdivision (b). Count 4 was dismissed by the prosecution before trial.

Defendant moved to bifurcate the trial, asking the court to exclude from the People's case-in-chief evidence related to the gang count and enhancements. The trial court denied the request, noting that although gang evidence is prejudicial, it goes to the

[1] All undesignated statutory references are to the Penal Code.

motive in this case, aside from the charged gang offenses or enhancements; thus "its probative value outweighs any prejudicial effect."

Defendant's previous contact with police

Deputy Mario Magana testified he did a field interview with defendant in 2012. He and another deputy saw defendant "on a quad on the road surfaces" and "decided to conduct a traffic stop." Defendant fled on foot and the officers pursued him. They eventually caught defendant and spoke to him about his gang affiliation. Defendant admitted he was a "Southern gang member or Southern." Magana noticed defendant has "south" tattooed on his right hand and "side" on his left hand "which is Southside, Southerner, associated with that gang, the Rexland gang, and he has three dots on his left wrist, three dots for being a Southerner, as well."

Deputy Jesus Cabral testified he contacted defendant in September 2011. That night, he was driving through the neighborhood when he saw a group of people next to a vehicle. The group ran away from the car as Cabral approached. Cabral stopped, approached, and ordered them to sit on the sidewalk. Three people, including defendant, walked out from the driveway and sat on the curb. Cabral saw a fourth person, Carlos Gomez, sitting between two trash cans. When Cabral went to speak with him, he noticed a pellet gun next to Gomez. Cabral also "noticed some tagging on the trash cans on the property" that said "VRP" which, he testified, refers to the gang Varrio Rexland Park. Looking through the rear window of the car the group was standing near when he arrived, Cabral also saw a gun and what appeared to be narcotics on the floorboard of the car. He seized the contraband and confirmed it was a loaded gun and cocaine.

Deputy David Chandler testified he was dispatched on February 28, 2015, to a church after the church's alarm was triggered. He found defendant and Luis Gomez at the scene rummaging through tables. Defendant and Luis Gomez ran, but the police caught and apprehended them.

Officer Rodolfo Rivera testified he worked as a deputy probation officer and met defendant on December 7, 2012, outside of a motel room. Defendant admitted to Rivera that he was a member of the Varrio Rexland Park gang and his moniker was "Pistola." Defendant was with Carlos Gomez, Luis Gomez, Justin Valencia, and Antonio Gaitan.

Officer Jared Agerton also testified he is a probation officer and he met defendant at defendant's house on October 7, 2011. Agerton knocked on the door to conduct a search of the premises and went inside because the door was ajar. He contacted several of defendant's family members as he conducted a protective search of the house. After hearing footsteps upstairs, Agerton found defendant, who was 17 years old at the time, and Luis Gomez, who was 13 years old at the time, hiding in the attic. Underneath a couch in the home, Agerton found a loaded gun that defendant admitted belonged to him.

Deputy Daniel Sanchez testified he was dispatched to defendant's house on May 9, 2013. He stated he found gang indicia or writings inside the residence, including a metal buckle with the letter "R" on it, a black baseball hat with the letters "RP," a blue baseball cap with "KC" on it, and a notebook with references to the Varrio Rexland 13 gang.

Deputy Tovar testifies as a gang expert

Deputy Alberto Tovar testified he works in the gang suppression unit in the Kern County Sheriff's Office and before that he had worked as a detentions deputy in the jail where he had contact with thousands of gang members, the majority of which were Southern Hispanic gang members known as Sureños. He testified he was familiar with the gang Varrio Rexland Park because he has patrolled that area, spoken with VRP gang members, and spoken with other officers who have worked in that area for several years. He has also investigated two or three VRP gang-related crimes. Tovar opined the VRP gang had approximately 15 to 20 active members, and they engaged in crimes including "[m]urders, attempted murders, robberies, burglaries, assault with a deadly weapon, any weapons violations, narcotics sales, intimidation of witnesses, criminal threats, [and]

vehicle thefts." Tovar testified he has been to the Rexland Acres area approximately 30 times in the last year and has seen a lot of VRP, Rexland Park, and X13 graffiti.

Deputy Tovar explained that if a VRP gang member responded "hell no" when asked if he had dropped out of the gang, it means he is still actively part of the gang and the question was offensive. Tovar interpreted the phrase "in good standing with the gang" to mean "[t]hey are actively still with the gang, still associating with the gang." He also testified that he reviewed, in person, defendant's tattoos and the graffiti in VRP territory. He noted, based on his reading of reports and conversations with other deputies, he knew defendant's gang moniker or nickname to be Pistola, Pistol Pete, or Pistol. He averred defendant's KC and three dots tattoos were both commonly used by Southern Hispanic gang members. He also testified defendant had "RP" tattooed on his middle finger, which stands for Rexland Park. Tovar testified he took photos earlier that week and saw new tattoos on defendant since the night of the shooting, including an "R" on his forehead for Rexland.

Deputy Tovar testified he had heard the officers and deputies testify about their contacts with defendant and had reviewed the related reports and some other reports in preparation for offering testimony regarding defendant's gang status and history. He was familiar with defendant's predicate offense, *People v. Carlos Gomez, Justin Valencia, and Miguel Perez* (defendant), BF150099A, B, and C. Before Tovar testified further, the court instructed the jury, "You may consider evidence of gang activity only for a limited purpose. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

Deputy Tovar opined defendant was an active member of the gang Varrio Rexland Park on or about March 28th and March 29th, 2015, the date C.U. was shot. Tovar based his opinion "on the totality of all the reports, all the street contacts, defendant admitting

several times that he goes by the moniker of Pistol[,] … the tattoos … the offense reports[,] … officers' contacts with them, and what they've noted."

The prosecutor then posed Deputy Tovar with a hypothetical mirroring the facts of the instant case. Tovar testified, based on these circumstances, it was his opinion such crimes were committed in association with and for the benefit of the Rexland Park gang given that:

> "[Y]ou have an individual who's with other Rexland Park gang members. He is told to shoot the individual who's confronting him. [¶] By him shooting him, he basically elevates the gang status within that community. It shows that they're violent. They're not scared to be—to commit an act of violence. They will not be disrespected. They will do what they have to do … to uphold the reputation of being a violent criminal street gang, especially when they're called upon within their territory."

Tovar also noted it was significant the shooter was challenged in his territory because if he did not respond or act in front of his fellow gang members, it would be a sign of weakness by the gang.

Verdict

A jury found defendant guilty on counts 2, 3, 5, and 6 for assault with a firearm, unlawful discharge of a firearm in a grossly negligent manner, unlawful possession of a firearm by a felon, and participation in a criminal street gang. It also found true gang enhancements and enhancements for personal use of a firearm and personal infliction of great bodily injury on a nonaccomplice. The jury could not reach a verdict as to count 1 for attempted first degree murder, and the court declared a mistrial as to that count. In a bifurcated proceeding, the court found true prior prison term allegations.

The court sentenced defendant to 25 years in state prison, which includes the upper term of four years for assault with a firearm (count 2), plus 10 years consecutive for the firearm enhancement, plus 10 years consecutive for the gang enhancements, and one year for the prison prior. The terms on the remaining counts and enhancements were stayed. Defendant appeals.

DISCUSSION

I. *Sanchez* Error

Defendant first contends Deputy Tovar, the prosecution's gang expert, improperly relied upon and testified to testimonial hearsay. He contends the admissible evidence was insufficient to support his substantive gang conviction and the gang enhancements.

A. Standard of Review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The jury's findings on enhancement allegations are reviewed under the same standard. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

B. Applicable Law

1. Gang participation and gang enhancement

"Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment." (§ 186.22, subd. (a).) "The plain, unambiguous language of the statute targets *any* felonious criminal conduct, not felonious gang-related conduct." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131.) Additionally, "[t]he plain meaning of section 186.22(a) requires that felonious criminal

conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member." (*Id*. at p. 1132.)

A gang enhancement applies to one who commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see *People v. Sanchez* (2016) 63 Cal.4th 665, 698 (*Sanchez*).) To establish a gang enhancement "'the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' [Citation.]" (*Sanchez*, at p. 698.) Section 186.22, subdivision (e) lists the predicate offenses including, but not limited to, assault with a deadly weapon or by means of force likely to produce great bodily injury and burglary as defined in section 459. (§ 186.22, subd. (e).)

2. Admissibility of gang expert testimony

"Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts." (*Sanchez*, 63 Cal.4th at p. 676.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid*.) "An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts." (*Ibid*.) "An expert is also allowed to give an opinion about what those facts may mean." (*Ibid*.) Gang experts can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. (*Sanchez*, at p. 685.)

What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception. (*Sanchez, supra,* 63 Cal.4th at p. 686.) In so holding, *Sanchez* disapproved of the court's earlier precedent in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*) to the extent *Gardeley* held an expert's opinion is not hearsay because any statements related by the expert go only to the basis of the expert's opinion. (*Sanchez, supra,* at p. 686, fn. 13.) It further disapproved of its previous decisions concluding the potential prejudicial impact of the expert's testimony was overcome by limiting instructions to the jury. (*Ibid*.)

Instead, the *Sanchez* court concluded "[i]f an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Sanchez,* 63 Cal.4th at p. 684, fn. omitted.)

3. Testimonial hearsay is inadmissible, and any error must be harmless beyond a reasonable doubt

Sanchez further held: "If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra,* 63 Cal.4th at p. 686.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* [*v. Washington* (2004) 541 U.S. 36] limitations of

unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Id*. at p. 680.)

Testimonial statements are those "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*Sanchez*, *supra*, 63 Cal.4th at p. 689.) To be considered testimonial, "the statement must be made with some degree of formality or solemnity." (*People v. Dungo* (2012) 55 Cal.4th 608, 619.) In contrast, nontestimonial statements are statements "whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, at p. 689.) Where a gang expert relies upon, and relates as true, a testimonial statement, "the fact asserted as true [has] to be independently proven to satisfy the Sixth Amendment." (*Id*. at p. 685.)

The erroneous admission of testimonial hearsay is reviewed for prejudice under the standard described in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (See *Sanchez*, *supra*, 63 Cal.4th at pp. 670–671, 698.) The People must show the error was harmless beyond a reasonable doubt,. (*Id.* at p. 698.) The erroneous admission of nontestimonial hearsay is a state law error, which is assessed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68; *People v. Duarte* (2000) 24 Cal.4th 603, 618–619.) The *Watson* test asks if it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*Watson*, *supra*, at p. 836.)

C. Analysis

Defendant argues we must reverse his conviction for active participation in a criminal street gang (count 6; § 186.22, subd. (a)) and the gang enhancements as to counts 2, 3, and 5 (§ 186.22, subd. (b)(1)) because the People's gang expert provided

case-specific testimonial hearsay in violation of his right to confrontation, rendering the trial fundamentally unfair. He contends the People's gang expert, Deputy Tovar, testified to details of four predicate crimes and opined as to the gang status of people alleged as members of the gang Varrio Rexland Park without any personal knowledge of the underlying facts. Rather, defendant argues, Deputy Tovar testified to hearsay from police reports and conversations he had with other officers. Defendant argues the admission of testimonial hearsay violated his Sixth Amendment right to confrontation and rendered the trial fundamentally unfair in violation of his Fourteenth Amendment right to due process. We agree, in part, that defendant was prejudiced by the admission of inadmissible hearsay as it relates to his substantive gang conviction and reverse count 6 on that basis. But we disagree that any error in admitting inadmissible hearsay in support of the gang enhancements prejudiced defendant.

1. Forfeiture

Though he did not object to Deputy Tovar's hearsay testimony below, defendant argues he may challenge the admission of such evidence for the first time on appeal based on a change of law that he could not have foreseen, given that *Sanchez* issued after trial in this matter. There is a split of authority on the issue of forfeiture in cases where the trial proceedings occurred prior to the *Sanchez* decision. (Compare *People v. Flint* (2018) 22 Cal.App.5th 983, 996–998 [*Sanchez* claim not forfeited because objections would have been futile] and *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507–508 [same] with *People v. Blessett* (2018) 22 Cal.App.5th 903, 925–941 [*Sanchez* claim forfeited because "the change in the law was foreseeable" and objections would not have been futile].) "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

Here, the People concede an objection would have been futile. Accordingly, we accept the People's concession and proceed to the merits of defendant's argument.

2. Active participation in a gang (Count 6)

Defendant first argues count 6 (active participation in a criminal street gang) required the People to show at least two gang members, including defendant, committed the present offense. He asserts only three people, other than defendant, "were identified as being outside of [R.R.]'s home on the night of the shooting: Javier Delgado, Jose Contreras, and Yovani Leyva." He contends "[n]o evidence was introduced regarding Delgado's gang membership status," and Leyva's gang status "was based solely on [Deputy] Tovar's inadmissible testimony." Additionally, even if we assume the jury concluded Contreras was a VRP gang member, the People did not establish he participated in the current offense.

The substantive gang offense requires a person commit an underlying felony with at least one other gang member. (*Sanchez*, *supra*, 63 Cal.4th at p. 673, fn. 5; *People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1134 ["The Legislature thus sought to avoid punishing mere gang membership in section 186.22(a) by requiring that a person commit an underlying felony with at least one other gang member"].) Here, it is undisputed that Leyva, Delgado, and Contreras were all present on the night of the instant offense. Defendant properly argues no evidence was introduced regarding Delgado's gang membership. Thus, we turn to the sufficiency of the evidence regarding the gang status of Leyva and Contreras and their participation in the current offense.

a. Evidence of Leyva's VRP membership status was inadmissible

Deputy Tovar opined Yovani Leyva was an active VRP member on the date of the offense. Tovar testified his opinion was based on the fact Leyva responded "yes" when Deputy Perez asked him if "he would participate in a fight with his friends who are VRP

gang members if they were involved" and "he would use deadly force to defend another VRP member." He referred to Deputy Perez's report in rendering his opinion.

The People argue Deputy Tovar's opinion on Leyva's gang membership did not violate defendant's right to confrontation because it was based on Deputy Perez's interview with Leyva during his investigation of the case, and Deputy Perez testified and was subject to cross-examination. But contrary to the People's argument, Deputy Perez did not testify to the facts referenced by Tovar during trial, and Leyva's statements to Deputy Perez were not independently proven by other competent evidence at trial. Rather, it was inadmissible case-specific hearsay not subject to any exception. Additionally, based on Tovar's reference to Deputy Perez's report, the information conveyed by Tovar appeared to be testimonial hearsay arising from "hearsay information gathered during an official investigation of a completed crime." (*Sanchez, supra*, 63 Cal.4th at p. 694.)

Deputy Tovar offered no other admissible evidence in support of his opinion Leyva was a member of VRP. Accordingly, Tovar's testimony regarding Leyva's gang membership was based on inadmissible hearsay. Thus, such evidence was insufficient to establish Leyva's status as a VRP member.

b. No evidence Contreras participated in current offense

We next turn to whether there was sufficient evidence Contreras was a gang member and that he was involved in the underlying felony. Deputy Tovar opined Jose Contreras was also an active VRP member on that date based on his contact with police, his gang-affiliated tattoos, and the fact he associates with VRP gang members. As with Leyva, in violation of *Sanchez*, Tovar also based his opinion on the fact Contreras responded "yes" when police asked him if "he would use deadly force to defend any of his fellow gang members if he saw them being assaulted." But Tovar also testified he had talked to Contreras two weeks before trial and Contreras admitted to him he "was a

Southerner" and "he backs up Rexland." Thus, his opinion that Contreras was an active member of the VRP gang at the time of the offense was based, at least in part, on his meeting with Contreras and Contreras's admission of which he had personal knowledge.

Nevertheless, defendant also contends there is no evidence Contreras participated or aided in the commission of the current offense. We agree. The People argue "[w]hile Contreras may not have been kicking and hitting the victim's car himself, he most certainly was a participant in the crime." But mere presence at the scene of a crime is not alone sufficient to establish criminal liability. (*People v. Durham* (1969) 70 Cal.2d 171, 181; *People v. Strickland* (1974) 11 Cal.3d 946, 958.) While R.R. identified Contreras as being present during the offense, there was no evidence Contreras participated in the criminal conduct beyond his presence at the scene. Thus, we cannot conclude Contreras committed "felonious criminal conduct" as required to establish active participation in a criminal street gang. (See *People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1138.)

The admissible evidence was insufficient to support the jury's conclusion defendant committed the underlying felony with at least one other gang member as was necessary to support the substantive gang offense, count 6. Thus, we conclude the *Sanchez* error resulted in prejudice to defendant under both the *Chapman* and *Watson* standards. In other words, there is a reasonable probability defendant would have achieved a more favorable result on count 6 but for the admission of inadmissible hearsay. Accordingly, we reverse defendant's substantive gang conviction.

The People are not foreclosed from retrying count 6. In determining whether retrial of an allegation violates double jeopardy, reviewing courts must consider all the evidence admitted at trial and submitted to the jury to establish whether there was substantial evidence to support the conviction by relying on the law as it existed at the time of trial. (See *Lockhart v. Nelson* (1988) 488 U.S. 33, 39–42.) The double jeopardy clause does not bar retrial after a reversal based on the erroneous admission of evidence if the erroneously admitted evidence supports the conviction. (*U.S. v. Chu Kong Yin* (9th

Cir. 1991) 935 F.2d 990, 1001; *People v. Cooper* (2007) 149 Cal.App.4th 500, 522.) At the time of trial, our Supreme Court's decision in *Gardeley* was still controlling precedent. Thus, upon remand, the People may retry defendant on count 6.

3. Pattern of criminal activity (gang enhancement)

Defendant also challenges the gang enhancements, arguing the People failed to establish admissible evidence of at least two "predicate offenses" to prove the VRP gang had a pattern of criminal activity. (See *Sanchez*, 63 Cal.4th at p. 698.) Defendant argues evidence of the alleged predicate offenses was inadmissible under *Sanchez*. Here, even if we disregard the evidence that defendant alleges is inadmissible under *Sanchez*, the admissible evidence regarding defendant's own conduct was sufficient to establish a pattern of criminal activity.

a. Current offense is valid predicate offense

First, defendant does not challenge the People's assertion that his current assault with a deadly weapon conviction qualifies as a predicate offense. It is settled that prosecutors can rely on evidence of the defendant's commission of a currently charged offense to satisfy the "pattern of criminal gang activity" requirement in section 186.22. (*People v. Tran* (2011) 51 Cal.4th 1040, 1046; *People v. Loeun* (1997) 17 Cal.4th 1, 10.) Assault with a deadly weapon or by means of force likely to produce great bodily injury is listed as a qualifying offense in section 186.22, subdivision (e)(1).

Here, the jury found defendant guilty of assault with a firearm and found true enhancements for personal use of a firearm and personal infliction of great bodily injury on a nonaccomplice. Thus, as the instructions provided, the jury could consider the current offense as a predicate offense if it concluded defendant was a VRP gang member. Defendant himself admits that his gang membership was not in dispute. Additionally, there was evidence defendant had admitted he was a member of VRP in the past, denied dropping out, and he had several tattoos evidencing gang involvement such that the jury

could have concluded he was a member of VRP who committed one of the enumerated offenses qualifying as a predicate offense. And, based on this independent evidence, Deputy Tovar provided his expert opinion that defendant was a VRP gang member. Thus, we conclude the evidence was sufficient to establish the current offense could qualify as a predicate offense.

b. Admissible evidence of defendant's prior burglary established a valid predicate offense

The People also offered evidence defendant and Luis Gomez committed the predicate offense of burglary in February 2015, a month before the charged offenses. Specifically, Deputy Chandler testified he was dispatched on February 28, 2015, to a church after the church's alarm was triggered. Deputy Chandler found defendant and Gomez at the scene rummaging through tables. Defendant and Gomez ran, but the police caught and apprehended them.

Before opining as to Gomez's gang status, Deputy Tovar testified that on August 29, 2014, defendant, Gomez, and Juan Perez were in a holding cell in the central jail when an individual who associates with Northern Hispanic gang members entered the cell. Defendant, Gomez, and Perez then assaulted the individual, hitting and kicking him. Tovar did not explain how he was familiar with this case or testify he had personal knowledge of the events involved. Relying upon that incident, the burglary, offense reports, and Luis Gomez's alleged admitted membership in VRP and regular association with VRP, Tovar opined that Gomez was an active member of the VRP gang when he committed the burglary of the church with defendant.

Defendant argues Deputy Tovar's testimony regarding Gomez's gang membership status was based on inadmissible hearsay. He contends, excluding such evidence, the admissible evidence only reflected defendant burglarized a church and there was no evidence another VRP member was involved in the church burglary. But even if we disregard Deputy Tovar's testimony regarding Gomez's gang membership as

inadmissible under *Sanchez*, defendant's involvement in the burglary alone qualifies as a predicate offense. (See *People v. Tran*, *supra*, 51 Cal.4th at p. 1046.)

A "pattern of criminal gang activity" can be established by proof of "two or more" predicate offenses committed "on separate occasions, *or* by two or more persons." (§ 186.22, subd. (e), italics added.) The Legislature's use of the disjunctive "or" indicates an intent to allow the prosecution the choice of proving either two or more predicate offenses committed on separate occasions or such offenses committed by two or more persons on the same occasion. (*People v. Loeun*, *supra*, 17 Cal.4th at pp. 9–10.) And the California Supreme Court has held that "a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion." (*People v. Tran*, *supra*, 51 Cal.4th at p. 1044.) Indeed, a "defendant's own conduct [can be] sufficient to establish the 'pattern of criminal gang activity' required to support the section 186.22 enhancement." (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 586.)

Here, defendant does not argue the evidence was insufficient to establish he previously committed burglary, a qualifying offense under section 186.22, subdivision (e), and he concedes that his gang membership "was not disputed." Because the burglary was committed by defendant on a separate occasion than the charged crime, it, too, qualifies as a predicate offense. (See *People v. Tran*, *supra*, 51 Cal.4th at p. 1048.)

Defendant, however, argues the burglary does not qualify as a predicate offense because there was no evidence it was committed for the benefit of the VRP gang, it was not violent, and, at the time of trial, it had not resulted in a conviction. But it is settled a predicate offense need not be gang related, and the plain language of section 186.22, subdivision (e) does not require a burglary to be violent to constitute a predicate offense. (See §§ 186.22, subd. (e)(11), 459; *Gardeley*, *supra*, 14 Cal.4th at pp. 621–622, disapproved on other grounds in *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13; *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 581.) Additionally, the commission, as opposed to conviction, is sufficient to qualify an offense as a predicate offense under the plain

language of section 186.22, subdivision (e). (*People v. Garcia* (2014) 224 Cal.App.4th 519, 524.)

Thus, through evidence of defendant's commission of the charged crime of assault with a deadly weapon and a separate prior burglary, the prosecution established a "pattern of criminal gang activity" as required to support the gang enhancements. Accordingly, any alleged error in admitting inadmissible hearsay as evidence of the other alleged predicate acts was harmless. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at pp. 586, 589 [concluding defendant's charged offenses and prior robbery conviction could qualify as predicate offenses for purposes of gang enhancement so any other violations of confrontation clause or state hearsay law were harmless].) Because we conclude the admissible evidence regarding defendant's own conduct established a pattern of criminal gang activity, we need not address defendant's challenges to the other alleged predicate offenses on hearsay grounds.

II. Lack of Predicate Offense Instruction

Defendant argues the trial court reversibly erred in failing to instruct the jury that offenses occurring after the present offense do not qualify as predicate offenses. He notes the court instructed the jury: "You may consider evidence of gang activity only for a limited purpose. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." Then, Deputy Tovar testified about an incident that took place in November 2015, approximately seven months after the shooting, during which defendant and three other people assaulted a fellow inmate within the jail's Southern housing unit. Later, the court instructed the jury that to prove the existence of a criminal street gang, the prosecution must show that on two or more occasions, members of the gang committed one of several enumerated felonies. Accordingly, the court's instructions implied the November 2015 offense could be used as evidence of the gang's

pattern of activity. The People respond defendant forfeited this issue by failing to object below. Alternatively, they argue there is no evidence the jury considered the November 2015 jail incident to be a predicate offense because it was not included in the discussion of the predicate offenses.

Even assuming this issue was preserved for our review, we cannot conclude defendant was prejudiced by the lack of an instruction stating offenses occurring after the present offense do not qualify as predicate offenses. It is true that crimes committed after the date of the commission of the charged offense may not serve as predicate offenses to show a pattern of criminal gang activity. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458; *People v. Godinez* (1993) 17 Cal.App.4th 1363, 1370.) But here, there is no evidence the People offered the November 2015 jail incident as a predicate offense. Instead, Deputy Tovar testified the offense was significant because it showed defendant is "still actively participating with other Southern Hispanic gang members or within a Southern housing unit, still actively committing acts of violence or still joining or still participating within the activities of the jail system." Neither the court nor the prosecutor instructed the jury to consider this incident as a predicate offense either in the jury instructions or during trial.

We reject defendant's second contention.

III. Ineffective Assistance of Counsel

Defendant next asserts his counsel was ineffective for failing to object to the People's closing argument when the prosecutor referenced a fact not in evidence.

A. Standard of Review and Applicable Law

A defendant claiming ineffective assistance of counsel must satisfy *Strickland*'s two-part test requiring a showing of counsel's deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) As to deficient performance, a defendant "must show that counsel's representation fell below an

objective standard of reasonableness" measured against "prevailing professional norms." (*Id.* at p. 688.) The prejudice prong requires a defendant to establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

B. Analysis

Deputy Tovar testified about an alleged predicate offense during which an individual in a motorized wheelchair was in the middle of the street in the Rexland Park neighborhood blocking a car from passing. The driver got out of his car and was assaulted by a group of people. Defendant argues his counsel was ineffective for failing to object to the prosecutor's comments in closing argument that Contreras was the individual in the wheelchair blocking the street. He argues no evidence was introduced Contreras was the individual involved in that predicate offense. The People respond "counsel's failure to object to the prosecutor's argument that Jose Contreras was the man in the wheelchair was reasonable and did not prejudice" defendant.

"'"'[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.…"' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 221; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 368.) But a prosecutor who suggests facts outside the record or mischaracterizes the evidence commits misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 823, 827–828; *People v. Villa* (1980) 109 Cal.App.3d 360, 365.) "[A] mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772.)

Here, the instance of alleged improper prosecutorial argument was not so damaging or prejudicial to defendant's case as to require a finding of incompetence based

on defense counsel's failure to object. Counsel may well have tactically assumed that an objection or request for admonition would simply draw closer attention to the prosecutor's isolated comment or that the prosecutor's argument drew a reasonable inference from the evidence; thus, any objection would have been futile.

Moreover, defendant has not established a "reasonable probability" that absent defense counsel's failure to object to this portion of the prosecutor's closing argument, the result of the trial would have been different. The trial court instructed the jury: "Nothing that the attorneys say is evidence. In their … closing arguments, the attorneys discuss the case, but their remarks are not evidence." (CALCRIM No. 222.) Had the trial court sustained an objection to the prosecutor's comments as error, it would have properly admonished the jury in similar terms, to disregard the prosecutor's comment and that arguments of counsel are not evidence.

We reject defendant's third contention.

IV. Cumulative Error

Defendant argues his gang conviction and enhancements should be reversed based on the cumulative effect of the errors he asserts in his first three arguments on appeal. He contends the prejudice resulting from the admission of inadmissible hearsay testimony in violation of *Sanchez* was magnified by the court's failure to instruct the jury not to consider offenses occurring after the date of the current offense as predicate offenses, and his counsel's failure to object to the prosecutor's improper closing argument.

> "Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to defendant absent a combination of errors. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 646; *In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32 ['Under the "cumulative error" doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial.'].) 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial."' (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)" (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216–1217.)

Except for the errors we have identified herein, we conclude all other errors alleged were individually and collectively harmless.

We reject defendant's fourth contention.

DISPOSITION

Defendant's conviction for count 6 is reversed. The case is remanded for further proceedings. The People may refile the substantive gang offense; the People shall notify defendant of their intent to refile count 6 within 30 days after the remittitur is issued. If the People elect not to retry defendant on count 6, the trial court is directed to issue an amended abstract of judgment omitting count 6 and to forward it to the appropriate authorities.

In all other respects, the judgment is affirmed.

_____
PEÑA, Acting P.J.

WE CONCUR:

_____
SMITH, J.

_____
DESANTOS, J.